

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE COMMISSIONER OF PATENTS AND TRADEMARKS

In re _____)
)
)

APR 13 1999

DECISION

, petitioner, requests a refund of the petition fee that accompanied his September 16, 1997, petition to the Commissioner, which sought review of the August 20, 1997, decision of the Director of the Office of Enrollment and Discipline (Director) denying him a passing score on the August 28, 1996, registration examination. The petition is denied.

BACKGROUND

Petitioner received a failing score (64) on the morning section of the August 28, 1996, registration examination. On April 7, 1997, Petitioner requested regrade of the morning section of the examination. See 37 C.F.R. § 10.7(c). On August 20, 1997, the Director issued a decision on Petitioner's request, increasing his score by 2 points, to 66. On September 16, 1997, Petitioner requested the Commissioner's review of the Director's August 20, 1997, decision. See 37 C.F.R. 10.2(c). His petition was accompanied by the required \$130 fee.

In the interim, Petitioner sat for and passed the morning section of August 27, 1997, registration examination. He was notified of his passing score by letter dated February 10, 1998. Over two months later, on April 17, 1998, Petitioner filed a request to withdraw his September 16, 1997, petition to the Commissioner. In that petition, Petitioner sought a refund of his petition fee if the petition was withdrawn or, in the alternative, a decision on the petition if a refund was not possible. On May 19, 1998, the Commissioner dismissed Petitioner's

September 16, 1997, petition because it had been rendered moot when Petitioner sat for, and successfully passed, the morning section of the August 27, 1997, registration examination. On July 20, 1998, noting that the April 17, 1998, petition and the May 19, 1998, decision appeared to have crossed paths, the Commissioner dismissed Petitioner's April 17, 1998, petition as moot.

Petitioner's present petition once again seeks reimbursement of the \$130 fee that accompanied his September 16, 1997, petition.

DISCUSSION

Petitioner raises several arguments in support of his request for a refund. First, Petitioner argues that a "dismissed petition does not require a fee because no decision was made on the petition." Petition at 2. This argument is misplaced. As I noted in my July 20, 1998, decision:

... Title 35 U.S.C. § 42(d) permits the Commissioner to refund "any fee paid by mistake or any amount paid in excess of that required." After receiving notice that he had failed the morning section of the August 28, 1996, examination, Petitioner had two choices--seek a regrade of the scoring on the morning section or retake the morning section of the examination. Each choice had certain time limits that required the payment of a fee in order to file a paper and preserve legal rights. Petitioner chose to do both, and in so doing, incurred the respective fees. Ultimately, he was unsuccessful on his request for regrade, but successful on his retake of the morning section of the examination. Thus, Petitioner has received what he sought--admission to practice before the PTO in patent matters. Accordingly, Petitioner's \$130 fee was not paid by mistake or in excess of what was required. See Miessner v. United States, 108 USPQ 6, 7 (D.D.C. 1955) (refund of appeal fee paid after examiner's final rejection but prior to examiner's withdrawal of final rejection was not fee paid by mistake).

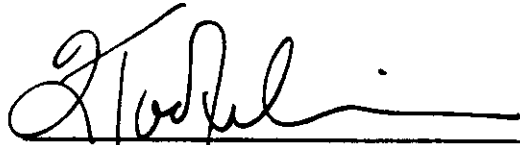
Decision at 2-3.

In addition, Petitioner argues that "an error on the part of the U.S. Patent and Trademark Office should not be the responsibility of [Petitioner] and paid for at the expense of [Petitioner]." Id. Again, as I noted in my July 20, 1998, decision, "[e]ven if the petition had been received in

time to grant the withdrawal request, Petitioner would not have been entitled to a reimbursement." Id. at 2. The fact that the April 17, 1998, petition for withdrawal of the September 16, 1997, petition "crossed paths" with the May 19, 1998, decision rendering that same petition moot is irrelevant to whether Petitioner is entitled to a refund. Accordingly, Petitioner is not bearing responsibility for, or paying the expense of, the papers having crossed paths in the Patent and Trademark Office.

CONCLUSION

Because Petitioner's \$130 petition fee was neither paid by mistake nor in excess of what was required, Petitioner's request for a refund of the fee is denied.

A handwritten signature in black ink, appearing to read "Q. Todd Dickinson", written over a horizontal line.

Q. Todd Dickinson

Acting Assistant Secretary of Commerce and

Acting Commissioner of Patents and Trademarks